Office-Supreme Court, U.S.
FILED
OCT 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-190

IN THE

Supreme Court of the United States

October Term, 1983

ABATTI FARMS, INC. AND ABATTI PRODUCE, INC.
Petitioners,

vs.

AGRICULTURAL LABOR RELATIONS BOARD AND
UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of California

PETITIONERS' REPLY BRIEF

RICHARD A. PAUL
EDWARD J. MCINTYRE
DANIEL G. LAMB, JR.
GRAY, CARY, AMES & FRYE
2100 Union Bank Building
San Diego, California 92101
(619) 699-2843

JAMES O. HEWITT
JOSEPH L. MARSHALL
HEWITT, SULLIVAN & MARSHALL
1010 Second Avenue
Suite 2121
San Diego, California 92101
(619) 239-2121
Attorneys for Petitioners

TABLE OF CONTENTS

PAGE

I. THE ALRB'S RELIANCE ON *KREMER* IS MISPLACED 2

II. THE ALRB'S CONTENTION THAT SUMMARY DISPOSITION OF A PETITION FOR REVIEW OF A DECISION OF THE ALRB IS A RULING ON THE MERITS IS A TRANSPARENT ATTEMPT TO PROCURE DENIAL OF THIS PETITION. IN FACT, THE ALRB AGREES WITH THE CONTENTIONS RAISED BY ABATTI 3

III. CONCLUSION 4

APPENDIX 7

TABLE OF AUTHORITIES

CASES	PAGE
Kremer v. *Chemical Construction Corp.* 456 U.S. 461 (1982)	2
United States v. *Utah Construction and Mining Co.* 384 U.S. 394 (1966)	5
ADMINISTRATIVE DECISIONS	
Abatti Farms, Inc. and United Farm Workers, 9 ALRB No. 59 (1983)	3, 4
High and Mighty Farms and United Farm Workers, 8 ALRB No. 100 (1982)	4
STATUTES	
N.Y. Exec. Law § 290, *et seq.* (McKinney 1972)	2
N.Y. Exec. Law § 298 (McKinney 1972)	2

IN THE

Supreme Court of the United States

October Term, 1983

ABATTI FARMS, INC. AND ABATTI PRODUCE, INC.
Petitioners,

vs.

AGRICULTURAL LABOR RELATIONS BOARD AND
UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of California

PETITIONERS' REPLY BRIEF

I

THE ALRB'S RELIANCE ON *KREMER* IS MISPLACED.

The ALRB suggests that *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982), is "dispositive of the issues" raised by Abatti. Respondent's Brief in Opposition, at 6.

In *Kremer*, the Court was not presented with, and did not decide, the issues presented in this case, for the very reason that judicial review under the New York Human Rights Law[1] there at issue resulted in a judgment, on the merits of the appeal, which was entitled to res judicata effect under New York law. 456 U.S. at 466-467. The judgment of the Supreme Court, Appellate Division, in *Kremer*, was issued pursuant to N.Y. Exec. Law § 298 (McKinney 1972), which mandates that the petition "shall be heard and determined" and that the court issue its "judgment and order" on the merits of the cause before it. Kremer received that which Abatti did not, and that which Abatti contends is constitutionally compelled: An adjudication of the merits of its appeal.[2]

---

1. N.Y. Exec. Law § 290, *et seq.* (McKinney 1972).

2. The full text of the Appellate Division's judgment in *Kremer* is reproduced as Appendix A. The judgment recites that the court read the papers, heard the litigants, deliberated on the merits of the case before it, and confirmed the ruling below.

II

THE ALRB'S CONTENTION THAT SUMMARY DISPOSITION OF A PETITION FOR REVIEW OF A DECISION OF THE ALRB IS A RULING ON THE MERITS IS A TRANSPARENT ATTEMPT TO PROCURE DENIAL OF THIS PETITION. IN FACT, THE ALRB AGREES WITH THE CONTENTIONS RAISED BY ABATTI.

The ALRB argues for purposes of this petition that summary denials of petitions for review of ALRB decisions constitute rulings on the merits, analogous to this Court's decisions summarily dismissing appeals, or summary denials of review of decisions of California constitutional agencies vested with judicial power. Respondent's Brief in Opposition, at 9-15.

In its own adjudicated cases,[3] the ALRB concedes that summary denials of petitions to review its decisions are nothing more than a refusal by the Court of Appeal to exercise discretionary jurisdiction, and do not constitute affirmances on the merits:

> We noted in *High and Mighty Farms* (1982) 8 ALRB No. 100, that the appeal process under the National Labor Relations Act (NLRA) differs from the appeal process under the Agricultural Labor Relations Act (ALRA). Orders issued by the NLRB are not self-executing, and the NLRB must apply to the appropriate United States Court of Appeals to secure enforcement of its orders. Any person aggrieved by a final order of the NLRB may seek review of the order. Unlike the NLRA, the ALRA provides for discretionary review of our orders by a California Court of Appeal, rather than review as of right under

---

3. The full texts of the two cited ALRB opinions are lengthy. Abatti has quoted those portions material to the issue presented. Abatti would be pleased to provide full texts if the Court desires.

> the NLRA. Thus, under the ALRA, when a court of appeal declines to exercise jurisdiction by denying a petition for review, the status of the case is as if no appeal had been filed, and this Board retains jurisdiction to modify and enforce its remedial Order. (*High and Mighty Farms, supra*, 8 ALRB No. 100 citing *Tex-Cal Land Management, Inc.* v. *ALRB* (1979) 24 Cal.3d 335.) *Abatti Farms, Inc. and United Farm Workers*, 9 ALRB No. 59, at 21 (ALRB, October 7, 1983).

In *High and Mighty Farms and United Farm Workers*, 8 ALRB No. 100, at 14 (1982), the Board held:

> The Court of Appeal denied the petition for review in the instant case, and it has therefore been neither affirmed nor reversed by the court. According to the Supreme Court's *Tex-Cal* decision, the present status of this case is as if the appeal had never been filed. Since the Court of Appeal's denial of the petition for review is not a decree or order of the court, our original remedial Order in this case is intact, and our power to modify the Order is the same as it would have been had there been no appeal. [Footnotes omitted.]

III

CONCLUSION

Where it served its interest[4] the ALRB has recognized that summary denials are not judicial acts of affirmance or

---

4. *High and Mighty, supra*, dealt with the power of the ALRB, after summary denial of review, to modify its order to increase the interest rate on make whole awards. In that context, the Board found that there was no res judicata bar to further action on its part since no order or decree was entered by the court of appeal affirming or reversing the Board's decision. *See* text, *supra*. The Board thus advances the anomalous position that summary denials are on the merits for aggrieved parties, but not on the merits for the Board itself.

reversal and do not entail the entry of an order or decree which has preclusive effect. The effect of a summary denial is to leave the case as if no petition had ever been filed. Unlike Ruben Kremer, Abatti has not had its day in court to have the merits of its case decided under the appropriate standard for review.[5]

DATED: October 12, 1983

Respectfully submitted,

RICHARD A. PAUL
EDWARD J. MCINTYRE
DANIEL G. LAMB, JR.
GRAY, CARY, AMES & FRYE
2100 Union Bank Building
San Diego, California 92101
(619) 699-2843

JAMES O. HEWITT
JOSEPH L. MARSHALL
HEWITT, SULLIVAN & MARSHALL
1010 Second Avenue
Suite 2121
San Diego, California 92101
(619) 239-2121
Attorneys for Petitioners

---

5. *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966), relied on by the ALRB, holds only that finality may be accorded administrative findings of *fact* supported by substantial evidence. 384 U.S. at 399, 400, 404, 410. It does not hold, as the ALRB suggests, that unreviewed agency orders may be accorded the same res judicata effect on issues of law as judgments of a court. Abatti does not quarrel with according finality to agency findings of fact so long as they are determined by a court to be supported by substantial evidence.

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
FIRST DEPARTMENT

* * *

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 27, 1978

Present-Hon. Francis T. Murphy, Jr., Presiding Justice
Samuel J. Silverman
Herbert B. Evans
Arnold L. Fein
Arthur Markewich Justices

1877

[M-4560]

RUBIN KREMER,

—against—

THE STATE DIVISION ON HUMAN RIGHTS,
THE STATE HUMAN RIGHTS APPEAL BOARD
and CHEMICAL CONSTRUCTION CORPORATION,
RESPONDENTS

The above-named petitioner having presented a petition to this Court praying for an order, pursuant to Section 298 of the Executive Law, setting aside and annulling the determination of respondent The State Human Rights Appeal Board dated November 25, 1977, which affirmed an order of the respondent The State Division on Human Rights dated April 28, 1977, dismissing petitioner's complaint and determining there was no probable cause to believe that respondent Chemical Construction Corporation engaged in the unlawful discriminatory practice complained of, and respon-

dent Chemical Construction Corporation having submitted a memorandum in answer to said petition,

Now, upon reading and filing the notice of application, with proof of due service thereof, the petition of Rubin Kremer, verified December 6, 1977, and the memorandum of Rubin Kremer, all read in support of the application, and the memorandum of Messrs. Layton and Sherman in opposition to said application, and after hearing Mr. Rubin Kremer, appearing *pro se*, for the application, and Messrs. Layton and Sherman opposed; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent, The State Human Rights Appeal Board, be and the same hereby is confirmed, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI
Clerk

Source: Joint Appendix, *Kremer* v. *Chemical Construction Corp.*, No. 80-6045 (October Term, 1981) at 23-26.